87-738

No.

Supreme Court, U.S.
FILED
NOV 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

ANTHONY GUARINO,
Petitioner,

-vs.-

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE NEW YORK SUPREME COURT, FIRST DEPARTMENT

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QUESTIONS PRESENTED

1. Whether the petitioner was denied the effective representation of counsel in the trial court when counsel frankly admitted that due to his negligence, the defendant-petitioner received a longer sentence in prison on his plea of guilty than he should have?

2. Whether the courts below erred in refusing to reduce the sentence of petitioner, despite the frank admission on the record of his trial lawyer that he was negligent, and as result thereof, petitioner was required to be sentenced to a longer term of imprisonment than that promised originally by the prosecutor and the court?

THE PARTIES

The only parties to this litigation are the petitioner and the People of the State of New York. There has been no change of parties.

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OPINION BELOW

There was no opinion written by either the Appellate Division or the New York Court of Appeals. Their respective orders are annexed.

JURISDICTION

(A). The Court of Appeals of the State of New

York denied petitioner Leave to Appeal to that court, on the 16th day of September 1987. The New York Supreme Court, Appellate Division First Department, on the 9th day of June 1987, affirmed the judgment of the New York Supreme Court, County of New York rendered the 10th day of October 1986, which convicted the petitioner, upon his plea of guilty, of criminal sale of a controlled substance in the second degree, an A-2 felony. The plea was taken in connection with a plea-bargain wherein the petitioner, a first offender, was promised 4-1/2 years imprisonment if he pleaded guilty.

His trial attorney, however, was apparently very busy with other cases and neglected to inform the prosecutor that the plea-bargain would be accepted. The plea of guilty was taken on the 18th day of July 1986, which was substantially after the original plea offer had been made. The petitioner was sentenced to 6 years to life imprisonment by Justice Joan Carey. Defense counsel conceded, on the record, that it was due to his own negligence that his client was caused to serve an additional year and a half in jail because the trial lawyer had been preoccupied with other cases and did not get around to handling this one in time.

(B) The petitioner appealed to the Appellate Division of the Supreme Court of New York First Department, but judgment of conviction was affirmed, without opinion, on the 15th day of June 1987.

Leave to Appeal to the New York Court of Appeals was requested but Judge Richard D. Simons

denied Leave to Appeal on the 16th day of September 1987.

(C) The jurisdiction to review the judgment and order in question by certiorari is conferred under 28 U.S.C. §1257 and §1254.

Constitutional and Statutory Provisions Involved

The Fifth, Sixth and Fourteenth Amendments of the United States Constitution are involved herein.

STATEMENT OF THE CASE

Petitioner[1] had been represented by Jacob Eversoff, Esq., in the trial court. The petitioner-defendant had been originally promised a sentence of 4-1/2 years to life if he pleaded guilty which he had determined to do. This offer was made contingent upon relatively prompt notification to the prosecutor's office that the plea would be accepted, as well as cooperation.

Unfortunately for the defendant-petitioner, Mr. Eversoff was busy and preoccupied in an eight months' trial representing a different defendant in another court, and was unable to attend to this case. From time to time he sent law clerks or other personnel from his office, and the case was adjourned

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1 The petitioner is sometimes referred to as the "defendant" when referring to the proceedings in the trial court so as to avoid any confusion.

from time to time. Through the offices of another attorney, by the name of Joseph Panzer, the prosecutor and the court were informed that the defendant-petitioner was being seriously misrepresented by his trial lawyer because by this time, the offered plea had been raised to 8-1/3 years to life imprisonment. (a:6, a:5).[2]

The prosecutor refused to budge.

Ultimately Mr. Eversoff came to court and frankly admitted that it was counsel's own fault and negligence that caused this tragic situation to occur. Counsel explained to the court that he had been preoccupied with an eight months' trial in another court and frankly just lost track of this case and as a result the events that transpired occurred.

Thus, Mr. Eversoff said to the court (a:8):

> "You see, I didn't understand the parameters of that your Honor, and it's my fault and it's my fault because I was engaged before Judge Keenan for eight months. It was not the fault of the special prosecutor. ... But we're caught in a catch-22 situation which I think your Honor, in general posture of the administration of justice, just isn't right as far as this defendant is concerned.'

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2 Numerals in parenthesis preceded by the prefix "a" refer to pages of the appendix submitted to the court below.

Mr. Olievero, the prosecutor at the trial, admitted that since the offer had not been accepted soon enough, it had expired and now the minimum offer had been raised to 8-1/3 to life. (a:12).

After a good deal of pleading and begging, the prosecutor finally agreed to offer 6 years to life which was the sentence finally imposed.

Mr. Eversoff stated that the cooperation of the defendant had been proffered. Furthermore, he said that Guarino was a first offender and that it was grossly unfair that:

> "Mr. Guarino is being punished here in terms of years of his life, he's a first offender, because of the fact that myself, counsel here, was elsewhere engaged. Had I been here and had I been privy myself initially to the fact that the offer was some kind of a shifting fulcrum, so to speak, something I've never seen before. I don't think that this man would be facing 7 years. I am sure he would be facing 4-1/2 years." (a:8).

Mr. Panzer, who ultimately negotiated the final reduction of the raised plea from 8-1/3 to 6 years, told the court (s:4, 5).[3]

> "Mr. Eversoff on certain occasions sent up a paralegal even here which he

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[3] Numerals preceded by the prefix "s" refer to the sentencing minutes.

> permitted to represent this defendant he had no right to do this.
>
> Finally when 8-1/3 to life was offered, the People came back to me. I approached Mr. Olievero. He says, Joe, in deference to you, your many years of practice at the bar, we will give him 7 to life."

The defendant, in effect, was being treated as a "ping pong ball" through no fault of his own because of his lawyer's neglect. He lost the opportunity to get 4-1/2 years to life even though he pleaded guilty and wanted to take the plea that was offered.

The tragic and perplexing aspect of this case is that the petitioner was caught up in a miasma of bureaucratic policies that apparently dictated that unless a defendant takes his plea within a certain period of time, the years that he has to spend in jail are automatically increased.

POINT I

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, IN VIEW OF THE ADMISSION OF COUNSEL ON THE RECORD THAT HE WAS NEGLIGENT AND HAD BEEN SOLELY RESPONSIBLE FOR CAUSING THE PETITIONER TO RECEIVE A YEAR AND A HALF MORE TIME IN JAIL THAN HE SHOULD HAVE. THIS COURT SHOULD GRANT CERTIORARI AND RECTIFY THIS VIOLATION OF THE PETITIONER'S CONSTITUTIONAL RIGHTS TO EFFECTIVE COUNSEL.

By practice in New York State, the consent of the prosecutor is necessary to enable a defendant to take a plea to less than the entire indictment. In the case at bar, the petitioner was offered a plea to an A-2 felony with a promise that the prosecutor would recommend 4-1/2 years to life imprisonment which was considerably less time than an A-1 felony which would have required a minimum of 15 years imprisonment.

The petitioner agreed to plead guilty but unfortunately, his attorney was preoccupied in another court before a different judge in an eight months trial.

On the record, trial counsel admitted that it was due to counsel's own negligence that the defendant lost the opportunity to obtain a sentence for 4-1/2

years to life, but was saddled with a longer term of imprisonment, namely 8-1/3 years to life, due to the lawyer's negligence.

While it is true that ultimately the prosecutor agreed to lower his recommendation to 6 years to life, it was still higher than the 4-1/2 years to life that the petitioner could have gotten originally.

Defense counsel stated that he offered the petitioner's cooperation and presumably would have cooperated if that had gone through.

We submit that it is unconscionable to permit a defendant in the position of this petitioner to be incarcerated for an additional year and a half when his own lawyer admits that he failed to represent him adequately to the prejudice of the defendant.

The question with respect to adequacy of counsel is addressed to whether the lawyer involved was functioning adequately under the circumstances of the particular case involved.

We realize that an error in judgment is not enough (*Parker v. North Carolina*, 397 U.S. 790) but nonetheless, even the best lawyer in the world on occasion may be functioning inadequately in a particular case. *Brubaker v. Dickson*, 310 F. 2d 30, 37. In the *Brubaker* case, the court noted:

> "Due Process does not require 'errorless counsel ... but counsel likely to render and rendering reasonably effective assistance.'" (Emphasis ours).

See also United States v. Handy, 203 F. 2d 407; 23 C.J.S. Crim. Law §982 (a).

See too, People v. Byrne, 17 N.Y. 2d 209, N.Y.S. 2d 193 where the New York Court of Appeals proclaimed:

> "The right to have the assistance of counsel was held to be too fundamental to be made dependent upon nice calculations by Courts of the degree of prejudice arising from the denial."

In *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, the Supreme Court stated that the court must look to "actual performance" to determine whether the defendant was represented by ineffective counsel.

Since the Court did not rule upon the issue, or at least did not indicate that it had ruled specifically on this issue, we believe that a determination should be made as to whether the reason it declined to review certain errors that were raised in the appellate brief was or was not because of the ineffective assistance of trial counsel. If it was because of that fact, then we believe that a reversal is required, or at least a remand for a hearing. From the state of the decision as it exists now, the defendant-appellant cannot tell whether that Court found counsel below to be functioning adequately.

The issue which is posed when dealing with effectiveness of counsel is whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as

having produced a just result. (*Strickland v. Washington*, 466 U.S. 668).

We realize that under that case, a high deference must be given and there is a presumption of reasonableness. We maintain, however, that our brief demonstrates that there is a reasonable probability that the outcome would have been different if counsel had preserved petitioner's rights and acted promptly on the plea offer.

cf;: Kimmelman v. Morrison, 106 S. Ct. 2574.

In *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, the Court made it clear that representation by counsel was an essential Due Process rule as well as a Sixth Amendment right.

In *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 1022, the Supreme Court also said:

> "[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty ... The Sixth Amendment stands as a constant admonition that if the constitutional safeguards provided are lost, justice will not 'still be done'".

In *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, the Supreme Court of the United States, per Justice Sutherland, uttered these moving words in the opinion:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated laymen has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." (*Id.* 287 U.S. at 68-69, 53 S. Ct. at 64.)

We realize that in the case at bar, the petitioner did have a lawyer representing him. What we are arguing, however, is that the lawyer was not representing him adequately.

In *Holloway v. Arkansas,* 435 U.S. 475, 98 S. Ct. 1173, the United States Supreme Court recognized that there are situations where even the best lawyer cannot function adequately in a particular trial and each trial must be looked at separately to determine

whether there has been adequate representation by counsel.

Because of the generality of the decision of that Court, we do not know whether the Court specifically considered the point on inadequacy of counsel, especially in view of its failure to explain on what its affirmance was based upon, since it is enigmatic.

In *United States v. Cronic,* 466 U.S. 648 104 S. Ct. 2039, the Supreme Court of the United States again recognized the importance of effective legal counsel at a trial.

In *McMann v. Richardson,* 397 U.S. 759, 771, n. 14, 90 S. Ct. 1441, 1449, cited with approval in *Cronic,* the Supreme Court said:

> "It has long been recognized that the right to counsel is the right to the effective assistance of counsel."

It is seldom seen in a record where a lawyer will frankly admit that he was negligent and that he failed to properly represent his client.

Prejudice is clearly present since as result of this, petitioner Guarino will have to serve an additional year and a half in jail over than that time which he could have received had counsel attended to the case properly.

Accordingly, it is respectfully requested that this Court rectify this injustice and grant Certiorari.

We wish to point out that although it is obviously sound policy to keep plea bargains open for only a limited period of time, we submit that under the circumstances of this case where the defense counsel has admitted negligence that the petitioner not be penalized because of that negligence.

CONCLUSION

The petition for certiorari should be granted with instructions to modify the sentence to a period of 4-1/2 years to life.

Respectfully yours,

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A member of the Bar of this Court
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APPENDIX A

CERTIFICATE DENYING LEAVE FROM THE NEW YORK STATE COURT OF APPEALS

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. RICHARD D. SIMONS, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

CERTIFICATE DENYING LEAVE

ANTHONY GUARINO
Appellant.

I, RICHARD D. SIMONS, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to

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* Description of Order: Appeal from an order of the Appellate Division, First Department, dated June 9, 1987 which affirmed a judgment of Supreme Court, New York County (Joan Carey, J.), rendered October 10, 1986.

appeal is hereby denied.

Dated at Rome, New York
September 16, 1987

s_____
Associate Judge

APPENDIX B

ORDER OF AFFIRMANCE ON APPEAL FROM JUDGMENT BY THE APPELLATE DIVISION, FIRST DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

Present — Hon. Francis T. Murphy, Presiding Justice,
David Ross
Sidney H. Asch
E. Leo Milonas
George Bundy Smith, Justices.

The People of the State of New York,
Respondent,

-against-

Anthony Guarino,
Defendant-Appellant.

Order of Affirmance on Appeal from Judgment 30231

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Joan Carey, J.), rendered on October 10, 1986, and said appeal having been argued by Irving Anolik, of counsel for the appellant, and by Susan Corkery and Nancy Tegtmeier-Sunshine, of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER:

HAROLD J. REYNOLDS
Clerk

Counsel for appellant is referred to §606.5, Rules of the Appellate Division, First Department.